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No. 92-1708

IN THE

Supreme Court of the United States

October Term, 1992

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

DEFENDER INDUSTRIES, INC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Petition for Certiorari filed by Northwestern Mutual Life Insurance Company ("Northwestern") is an ill-disguised attempt to use the pendency of *TXO Production Corp v. Alliance Resources, Inc.*, No. 92-479 (argued Mar. 31, 1993), to buy time and postpone the date on which the judgment in this case must be paid. The petition should not be granted or even held pending decision in that case; it should be denied outright.

To say that Northwestern has had its day in court is an understatement. Its arguments have been aired before *two* different juries, *two* different district courts, and the Fourth Circuit in *two* separate appeals. As much as Northwestern tries to reargue the case in its petition, the undeniable fact is that the courts below carefully considered all of these fact-based arguments and confirmed the juries' findings that Northwestern's conduct was fraudulent, reprehensible, and warranted punitive damages. Even so, the courts below fully protected Northwestern's interests by reducing the punitive damages it must ultimately pay by *four-fifths* — to $5 million from $25 million. Most litigants would applaud a system that has so obviously worked to their benefit. Not Northwestern.

In its first question presented, Northwestern takes issue with the very process of post-trial review that saved it $20 million. Northwestern contends that the district court should have taken account of a state-court decision, *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991), as part of its analysis. But Northwestern fails to mention that the district court *did in fact* cite and apply *Gamble* in concluding that the punitive damages originally awarded by the jury were excessive and required a remittitur. Appendix to Petition for Certiorari ("Pet. App.") 29a-30a. Northwestern also fails to mention that it had argued to the district court that *Gamble* did *not* apply to this federal court case. Northwestern's post-trial strategy was hardly surprising, since the system of post-trial review in South Carolina is a highly deferential one that would have been far less favorable to Northwestern than the thoughtful, balanced review it actually received. But it certainly is surprising — as well as completely improper — for Northwestern now to take precisely

the opposite view and to urge that *Gamble* does in fact apply to its case. Northwestern's procedural due process claim is not properly presented and has no merit.

Northwestern's second question presented is equally unworthy of this Court's review. Northwestern complains that its award is "excessive," but proposes no standard — beyond an *ad hoc* "you-know-it-when-you-see-it" approach — by which punitive damages awards can be evaluated. Moreover, this case is hardly a suitable vehicle for the review of an excessiveness claim. Here, from the defendant's perspective, the system *worked*: Northwestern's liability was reduced by 80 percent, representing $20 million.

Northwestern complains that the award against it could be justified only on the basis of its wealth. This is flatly untrue. In fact, the district court explained that if wealth were the only consideration, it likely would have upheld the jury's original award of $25 million. Pet. App. 30a. The district court concluded: "In sum, the court is firmly convinced that a substantial punitive award against Northwestern is appropriate in this case." *Id.* at 28a. At two separate trials, Defender "demonstrated multi-tiered wrongdoing on the part of Northwestern and its agents. This wrongdoing included fraudulent conduct, threats of reprisal, and concealment. Additionally, the evidence was susceptible of the inference that high ranking Northwestern officials participated in the fraud." *Id.* The reprisal threatened by Northwestern, loss of Defender's largest customer, would have caused $2 million to $3 million dollars annually in harm to Defender. See pp. 4, 22-23, *infra*. Moreover, the legislatively prescribed penalty for Northwestern's misconduct was the loss of its license to do business in South Carolina, which would have cost Northwestern some $20 million per year in premium income. See p. 24-25 & note 25, *infra*. Given these factors, as well as the severity of Northwestern's conduct, a $5 million punitive damages award was hardly excessive.

STATEMENT OF THE CASE

Northwestern's Statement contains numerous errors and misstatements of fact and law. It also violates the most elementary canon of appellate practice that the evidence is to be construed in the light most favorable to the party opposing judgment as a matter of law — in this case, Defender Industries, Inc. ("Defender").[1]

In brief, the facts, as primarily reported by the Fourth Circuit (en banc) in the first appeal, are as follows:

(1) In late 1985 Defender began investigating the life insurance market to replace a $5 million life insurance policy in force on the life of the chairperson of the Board of Directors and the principal stockholder, Kathryn Inabinet Vickery. *Defender Industries, Inc. v. Northwestern Mutual Life Ins. Co.*, 938 F.2d 502, 503 (4th Cir. 1991) (en banc) ("*Defender*"); Pet. App. 55a. Northwestern agents began to solicit Defender and ultimately entered into negotiations over the terms of the policy. *Defender* at 503; Pet. App. 55a. At the time of the solicitation, Defender was uncertain as to the exact amount of insurance coverage required but estimated that it needed between $5 and $8 million of coverage. *Defender* at 504; Pet. App. 56a.[2] "As an inducement to Defender to purchase a policy from Northwestern, its agents represented that if Defender purchased the maximum amount of insurance coverage it anticipated it might need, Northwestern would permit Defender to reduce the coverage amount if, following receipt of the stock valuation, Defender determined that its actual insurance requirements were less."

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[1] Respondents Defender Industries, Inc., Kathryn Inabinet Vickery and the Kathryn Inabinet Vickery Marital Trust, are hereafter collectively referred to as "Defender." Defender Industries, Inc. is a South Carolina corporation and has no parent or subsidiary companies.

[2] Defender had retained professional assistance to value its stock in order to make an informed decision about the estimated amount of estate tax liability which would be due on Mrs. Vickery's death. At the time of the negotiations with Northwestern, Defender had not received the stock valuation. *Defender* at 503-04; Pet. App. 55a-56a.

Defender at 504; Pet. App. 56a. The Northwestern agents also explained that Northwestern would refund any excess premiums which resulted from such a reduction in the amount of the policy or it would credit them toward future premiums. *Defender* at 504; Pet. App. 56a. With this understanding, Defender purchased the Northwestern policy for the maximum amount of $8 million. *Defender* at 504; Pet. App. 56a.[3] Approximately seven months later when Defender determined it actually required $7 million of coverage and sought to reduce the policy to this amount, Northwestern refused to reform the policy as promised. *Defender* at 504; Pet. App. 56a. Defender also requested rescission of the policy, which Northwestern refused. Pet. App. 40a.

(2) Even more damaging, however, was the evidence the jury considered as part of its assessment of punitive damages that while the Northwestern policy was still in force a Northwestern agent "threatened Defender with the loss of one of its largest customers over whom a Northwestern agent, through family connections, exercised some measure of influence in the event Defender should cancel the policy." *Defender* at 504; Pet. App. 56a.[4] At the time of the threat in 1986, Defender employed approximately 300 workers at its customer's plant, J.A. 370:14-17; the district court (Anderson, J.) noted that "[t]his one customer generated revenues for Defender of *$2 million to $3 million per year*." Pet. App. 25a n.6 (emphasis added). (Northwestern's assertion in its petition that the compensatory damages awarded Defender of $106,513.74 "represents the most generous

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[3] The Fourth Circuit also noted another irregularity in the sale of the policy: "Northwestern maintained possession of the policy and did not deliver it to Defender until after the dispute precipitating this lawsuit arose." *Defender* at 504; Pet App. 56a. (A Northwestern agent wrote in an internal memorandum that an underwriter at Northwestern headquarters "related that our butts are on the line since the policy has not been delivered." J.A. 806.)

[4] A Defender executive considered the threat to be "extortion," J.A. 474:22-23, and an independent accountant who also heard the threat considered it "the same as blackmail." J.A. 336:23-24.

possible estimate of the injury that (Northwestern) *could* have inflicted through this tort," Petition for Certiorari ("Pet.") 2 (emphasis in original), is baseless on the record below.)

(3) After problems between Defender and Northwestern arose, a Northwestern agent wrote an internal memorandum saying:

> [T]he *Home Office's* position is becoming fairly clear that unless we were *malicious* in misrepresenting our product . . . , there doesn;t [sic] seem to be any basis for a refund. * * * It may come down to getting someone at Defender, . . . but the *Home Office* feels pretty strongly that they would like a letter signed that they [Defender] did see a Northwestern ledger and they can confirm that they did have all the facts pertaining to the case regarding the disclosure. It may be a good idea at this point of building some rapport back up out there to get that, but it may come down to that *if it gets real nasty*.

J.A. 812-13 (emphasis added). Thus, the *en banc* Fourth Circuit found: "One reasonable interpretation of interoffice correspondence between high-ranking Northwestern officials would allow the conclusion that the upper echelons in the company were aware of the agents' misconduct and attempted to conceal it." *Defender* at 504; Pet. App. 57a.

(4) After all of this incredible misconduct occurred, Defender's president flew from South Carolina to Cincinnati to meet with one of the Northwestern agents who had sold the policy and a Northwestern general agent. J.A. 372:8 to 373:9. Defender's president then wrote Northwestern's chief executive officer Donald Schuenke, stating: "We the Board of Directors and officers of Defender Industries feel we have been advised in a negligent and dilatory manner. We also have been threatened and lied to throughout this entire process." J.A. 817.[5] One of

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[5] The CEO was a lawyer and formerly served as general counsel for Northwestern. J.A. 453:14-18.

the Northwestern agents who had been closely involved in the sale of the policy also wrote the Northwestern CEO, stating: "[T]here is no question *we misrepresented, lied to, and used questionable business tactics* in trying to place the policy in question." J.A. 821 (emphases added).[6] In spite of this alarming factual backdrop, the senior Northwestern executive who purportedly investigated Defender's complaints informed Defender that Northwestern was unwilling to reform the policy and saw no reason to discipline the agents involved. *Defender* at 504; Pet. App. 57a, 35a.[7]

PROCEEDINGS BELOW

At the first trial, the jury returned a verdict for Defender of $106,513.74 actual damages, which was the exact amount of premiums paid by Defender to Northwestern during the nine months the policy was in effect, and $5 million punitive damages. *Defender* at 504; Pet. App. 57a. The district court reduced the punitive damages award to $10,000 and in the alternative ordered a new trial on punitive damages. The *en banc* Fourth Circuit reversed the reduction of the punitive damage award and remanded the case for a new trial only as to the amount of punitive damages. *See Defender* at 508; Pet. App. 66a. The court of appeals hinted that it would have preferred to let the jury's verdict stand but was constrained "by the proper exercise of appellate review to affirm" the new trial order. *Defender* at 507; Pet. App. 64a.[8]

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[6] Northwestern actually terminated this agent (Caroway) shortly after he wrote the letter to the CEO. J.A. 316-19.

[7] The record also showed that the Northwestern executive never contacted any of Defender's officers to discuss the complaint nor did he contact the Northwestern agent who had confirmed the misconduct in his letter to the CEO. J.A. 603:10-20.

[8] The Fourth Circuit stated: "We cannot say that the grant of a new trial on the issue of the amount of punitive damages constituted an abuse of discretion. Whether we *agree* with the ruling of the district court is not at issue here." *Defender* at 507; Pet. App. 64a (emphasis added).

At the second trial, the district court gave Northwestern every possible advantage. The district court required Defender to reprove much of its case, despite Defender's contention that certain issues were *res judicata*, Pet. App. 32a; the court admitted into evidence certain documents offered by Northwestern that the district judge had excluded at the first trial, *id.*; the court allowed Northwestern to offer evidence in *mitigation* that was not introduced at the first trial, *id.*; and the court charged the jury in accordance with *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), as Northwestern requested. *See id.*

Nonetheless, the evidence was in several critical respects more damaging to Northwestern than at the first trial, *see* pp. 23-25, *infra*, and the jury returned a verdict of $25 million in favor of Defender.

As part of its campaign to misrepresent the procedural safeguards it received below, Northwestern provides only a cursory description (Pet. 7) of the district court's post-trial review, which the court of appeals rightly praised as a "thorough, well-reasoned opinion" and affirmed in a *per curiam* decision. Pet. App. 5a.[9] The district court, after canvassing all relevant evidence in the case, explained that "the pertinent evidence demonstrates quite forcefully that punitive damages were appropriate in this case." Pet. App. 28a. Having reached that conclusion, however, "the court [was] constrained to conclude that a punitive award of $25 million, even given the highly inappropriate conduct which occurred here, is excessive and must be reduced." *Id.* at 28a-29a. The court explained that, "if one looks solely at the ability of the wrongdoer to pay, a $25 million dollar award might be justified. However, the ability of a financially sound defendant to pay a punitive award is but one of many factors which must be considered." *Id.* at 30a.

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[9] The court of appeals' opinion, no doubt because it faithfully applied settled law in an uncontroversial manner, was unpublished. In the Fourth Circuit, such opinions are not binding precedent. *See* Fed. R. App. P., Fourth Circuit Rules & Internal Operating Procedures ("I.O.P."), I.O.P. 36.5 and 36.6.

In reducing the award, the district court also ruled that "'any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused, including the compensatory damage award made by the jury.'" *Id.* at 30a (citation omitted). The district court concluded: "Giving due consideration to the relationship to the harm caused, other penalties for the conduct which occurred, improper profits and the plaintiffs' costs, and the ability of the defendant to pay, the court finds and concludes that $5 million is the most that a reasonable jury could award by way of punitive damages in this case." *Id.* at 31a.

I. THE FIRST QUESTION IS NOT PROPERLY PRESENTED AND HAS NO MERIT

In its first question presented, Northwestern invites this Court to ruminate "[w]hether, in a diversity case, a federal court is barred by the Seventh Amendment from reviewing an award of punitive damages under state law standards and procedures." Pet. at i (quoting first question presented). Whatever interest such a topic might hold, this is not the case in which to review it. Here, the court of appeals' decision below simply does not mention the issue, *see* Pet. App. 4a, largely because nothing in this case turns on it. The South Carolina "state law standards and procedures" are *less protective* of a defendant's rights than their federal counterparts and, accordingly, Northwestern in the courts below urged the *rejection* of "state standards and procedures" and the *adoption* of the federal approach. The district court applied both federal *and* state law in granting Northwestern a $20 million remittitur. There is simply no occasion to reach the Seventh Amendment question.

A. THE DISTRICT COURT APPLIED THE SOUTH CAROLINA LAW URGED BY NORTHWESTERN IN ITS PETITION

Northwestern devotes most of its presentation to an analysis of *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), as if it were seeking review of that decision. Strikingly

absent from the Petition for Certiorari is an analysis of the proceedings in *this* case. Perhaps Northwestern's omission can be explained by the fact that the court of appeals relied not simply on *Mattison*, but on this Court's decision in *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989). *See* Pet. App. 4a. Moreover, the district court, in imposing a substantial remittitur, specifically cited and invoked *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991), the very South Carolina decision that Northwestern now argues in its first question presented that the court did *not* apply. *See* Pet. App. 29a.

The district court, quoting from *Gamble*, explained that

> the punitive award must not be "grossly disproportionate" to the severity of the offense. This proposition was recognized by the South Carolina Supreme Court in *Gamble*, 406 S.E.2d at 354 ('upon completing its review, *dedicated to the postulate that no award be grossly disproportionate to the severity of the offense*, the trial court shall set forth its findings on the record')." * * * *Application of the foregoing principle* to the punitive award here leads to the inescapable conclusion that the award is grossly disproportionate to the severity of the conduct which occurred here.

Pet. App. 29a-30a (second emphasis added). Amazingly, Northwestern completely ignores *Gamble*'s critical role in the district court's post-trial review.

Northwestern cannot deny that the district court examined all of the factors articulated in *Gamble* for the post-trial review of punitive damages awards, and more.[10] Indeed, the district

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[10] The post-trial factors adopted by the South Carolina Supreme Court in *Gamble* are: "(1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related

court noted that the jury instructions in this case, based on the Fourth Circuit's ruling in *Mattison*, "borrow[ed] heavily from the *Gamble* standards" for post-trial review and were "'derived from *Gamble*.'" Pet. App. 12a (citation omitted).[11] Necessarily, the

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to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) as noted in *Haslip*, 'other factors' deemed appropriate." 406 S.E.2d at 354.

[11] Contrary to Northwestern's abbreviated reference to the "four factors" which were instructed to the jury in this case, Pet. 14, the district court instructed the jury as follows:

> The first category is the relationship to the harm caused. Any penalty, that is to say any punitive damage award you impose, should take into account the reprehensibility of the conduct, the harm caused, the defendant's awareness of the conduct's wrongfulness, the duration of the conduct, and the likelihood that the award will deter the defendant or others from like conduct, and also concealment, if any.
>
> Thus any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused including the compensatory damage award made by the jury.
>
> The second factor that you should consider is other penalties for the conduct. Any penalty imposed by the jury should also take into account as a mitigating factor any other penalty that may have been imposed or which may be imposed for the conduct involved including any criminal or civil penalty, or any other punitive damages award arising out of the same conduct.
>
> The third factor that you must consider is the improper profits, if any. The amount of any penalty may focus on depriving the defendant of profits derived from the improper conduct.
>
> Fourth, the final element relates to the ability to pay. The defendant's wealth or lack of wealth is a relevant factor. The award of punitive damages should be sufficient to appropriately punish the defendant for its conduct but not to the extent to affect economic bankruptcy.
>
> There is no mathematical formula for determining the amount of punitive damages to be awarded. However, the factors I have discussed with you in this charge must be considered by you in determining the award of punitive damages.

district court's post-trial review, which inquired as to whether the evidence in this case met those standards, encompassed the *Gamble* factors for post-trial review.[12] Indeed, the district court's review touched on each one, as well as on many others.[13]

> I instruct you that South Carolina law requires a meaningful individualized assessment of appropriate deterrence and retribution in establishing the appropriate amount of punitive damages.

J.A. 707-08.

Northwestern's statement that the Fourth Circuit in *Mattison* "reduce(d) most, but not all, of the eight *Gamble* post-verdict review factors into four criteria," Pet. 11, and thereby implying certain substantive law factors had been deleted, is grossly misleading. If anything, the four "criteria" articulated in *Mattison* include all of the *Gamble* factors plus the *Haslip* factors which provide even greater guidance and instruction to the jury in its deliberations.

[12] The Fourth Circuit noted that "[i]n assessing the appropriate amount of the nisi verdict the district court carefully addressed the factors the jury was to consider in awarding punitive damages and analyzed the evidence presented in a thorough, well-reasoned opinion." Pet. App. 4a-5a.

[13] For example:

(1) Defendant's degree of culpability — The district court found that Northwestern was guilty of intentional "multi-tiered wrongdoing," including "fraudulent conduct, threats of reprisal, and concealment." Pet. App. 28a. "[T]he evidence was susceptible to the inference that high ranking Northwestern officials participated in the fraud." *Id.* The court pointed to Northwestern's claim that "the refund promise, if carried out, would have been illegal under South Carolina law" and to Defender's argument "that Northwestern should be severely punished for allowing its agents to make a promise to do what they knew to be an illegal act." *Id.* at 26a-27a.

(2) Duration of the conduct — The district court found that Northwestern's wrongdoing spanned a sustained period of time and included a fraudulent promise, a "refus[al] to reform the policy as promised and refus[al] to refund the premium," and "a direct threat that Northwestern could cause Defender to lose one of its largest customers in the event Defender canceled its policy." Pet. App. 25a.

(3) Defendant's awareness or concealment — The district court explained: "As noted by the Fourth Circuit, the evidence was susceptible to the inference that the upper echelon of Northwestern's management was aware of the misconduct and attempted to conceal it. On retrial, it was

Northwestern attempts to argue that *Gamble*, in "heed[ing] the message of *Haslip*," created its own "similar system for independent judicial review of punitive damage awards," Pet. 10, which is supposedly more constraining than the review performed by the district court and the Fourth Circuit in this case. Northwestern's argument is a gross mischaracterization of South Carolina law and of the proceedings in this case.

Northwestern studiously avoids defining what it means by "independent" review. It obviously means to leave the impression that South Carolina courts review punitive damages awards according to a *de novo* standard, but that is simply incorrect. The words "independent" or "*de novo*" do not appear in *Gamble*. Indeed, *Gamble* explained that, "[i]n South Carolina, post-trial relief in the form of motions for judgment notwithstanding the verdict, new trial, or new trial *nisi* are available to defendants claiming a verdict excessive. *See* S.C.R.C.P. Rules 50 and 59." 406 S.E.2d at 354. Those rules are in relevant part the mirror

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revealed that in spite of the first award, Northwestern has still failed to discipline any of the agents involved." Pet. App. 26a.

(4) Existence of similar past conduct — The district court credited Northwestern on this factor, noting that "[t]here was no showing that the conduct which occurred here was part of a normal pattern or practice by Northwestern." Pet. App. 29a.

(5) Likelihood the award will deter the defendant or others from like conduct — The district court observed that, "although the South Carolina Insurance Commission had, and retains, the power to sanction Northwestern administratively, no such action has been taken by the insurance commission in seven years since Northwestern's fraudulent conduct occurred. Thus, Defender was able to argue that punitive damages were necessary as a deterrent in this case because, quite obviously, the administrative sanctions had not been invoked and, in all likelihood will not be invoked in the future." Pet. App. 27a-28a.

(6) Whether the award is reasonably related to the harm likely to result from such conduct — The district court gave "due consideration to the relationship to the harm caused." Pet. App. 31a.

(7) Defendant's ability to pay — The district court emphasized that "the ability of a financially sound defendant to pay a punitive award is but one of many factors which must be considered." Pet. App. 30a.

(8) "Other appropriate factors" — The district court looked to "other penalties for the conduct which occurred, improper profits and the plaintiffs' costs." Pet. App. 31a.

image of Fed. R. Civ. P. 50 and 59 under which post-trial review occurs in federal court. *See* West Publishing Co., S.C. R. Civ. P. 50 and 59 (1992), Notes ("This Rule 50 conforms to the Federal Rule" with minor exceptions (not relevant here)); ("This Rule 59 is substantially the Federal Rule"). In fact, there is no requirement under *Gamble* that a state trial court must consider any specific factors that the state supreme court enumerated; the decision's language is purely precatory. *See* 406 S.E.2d at 354 ("the trial court . . . *may* consider the following [factors]") (emphasis added). *Gamble* also stressed that "[t]he amount of damages, actual or punitive, remains largely within the *discretion of the jury*, as reviewed by the trial judge." 406 S.E.2d at 355 (emphasis added). The *Gamble* court cited a South Carolina case which underscored that, "in the assessment of punitive damages, there is no exact monetary standard which can be used," and that therefore that "courts are generally reluctant to disturb an assessment of damages by the jury." *Fennell v. Littlejohn*, 125 S.E.2d 408, 414-15 (S.C. 1962) (cited at 406 S.E.2d at 355).

South Carolina has confirmed subsequent to *Gamble* that a trial court may set aside a punitive damages award only according to traditional common-law standards; that is, a court may set aside or reduce an award if it concludes that the award evinces "undue liberality" in light of the evidence, and it should set aside the verdict completely "if a verdict is so grossly excessive and shockingly disproportionate that it indicates the jury was motivated by passion, caprice, prejudice, or other consideration not founded on the evidence." *Caldwell v. K-Mart Corp.*, 410 S.E.2d 21, 25 (S.C. Ct. App. 1991).

In fact, in its motion for a new trial before the district court, Northwestern recognized the proper South Carolina standard: "In South Carolina, a punitive damages award must not be 'grossly disproportionate to the severity of the offense' (*Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991)) and cannot stand if it is 'grossly excessive.' *Sanders v. Prince*, 403 S.E.2d 640, 642 (S.C. 1991)." Defendant's Memorandum in Support of Motions for New Trial and Certification, at 2 (filed

Feb. 18, 1992). Northwestern made no mention of the "independent review" and consideration of "other factors and evidence" (Pet. 10) to which it now claims it was entitled. Not only does this constitute a waiver of Northwestern's current objection, but it also reveals the utterly fictitious legal basis on which Northwestern's first question rests.

The most Northwestern can muster in its petition is that, in state court, a trial judge "would be required to make appropriate findings and to 'explain the conditions that require a particular award of punitive damages.'" Pet. 15 (citation omitted). But that is precisely what the district court in this case did in reducing the award from $25 million to $5 million. See note 13, *supra*. If anything, the district court's scrutiny of the award in this case was more rigorous than the analysis that a South Carolina trial court would have been required to undertake.[14]

In a case where post-trial review has reduced a punitive award by four-fifths, it not credible for a defendant to complain that the review was "highly deferential." Pet. 13. In short, the first question presented is a mirage, based on a misrepresentation of South Carolina law and of the proceedings below.

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[14] Northwestern also criticizes the federal appellate standard of review on the ground that it "asks only the extremely relaxed question whether the district court abused *its* discretion." Pet. 15 (emphasis in original). Northwestern neglects to mention that the South Carolina Supreme Court announced the *very same standard* for appellate review in *Gamble*: "this Court's review is limited. . . . Only when the trial court's discretion is abused, amounting to an error of law, does it become the duty of this Court to set aside the award." 406 S.E.2d at 355. *See also Fennell v. Littlejohn*, 125 S.E.2d 408, 414 (S.C. 1962) (cited approvingly on this point by *Gamble*, 406 S.E.2d at 355) ("it is well settled that the granting of a new trial on the ground that the verdict is so excessive as to indicate caprice, passion or prejudice on the part of the jury is in the discretion of the trial judge and his decision thereon will not be disturbed unless abuse of discretion is shown"); *Caldwell v. K-Mart Corp.*, *supra*, 410 S.E.2d at 25 ("The *appellate court* will not set aside a verdict for undue liberality") (emphasis added).

B. IN ANY EVENT, NORTHWESTERN TOOK THE CONTRARY POSITION BELOW AND HAS THEREFORE WAIVED ITS OBJECTION

Even assuming that the district court had not applied the *Gamble* standard, Northwestern would be estopped from complaining now. Northwestern *never requested* the kind of "independent" review to which it now claims it was entitled. Indeed, before the district court, Northwestern consistently took the position that the Fourth Circuit's *Mattison* decision was controlling and, more specifically, that *Gamble* did not apply to the proceedings because it was in federal court. In a memorandum in support of a motion in limine filed prior to the second trial, for example, Northwestern argued that "[t]he traditional South Carolina law of punitive damages no longer applies to this federal diversity case." Defendant's Memorandum in Support of Its Motion in Limine, at 1 (filed Nov. 19, 1991). "[B]ecause of the limitations of the Seventh Amendment and the requirements of the Federal Rules of Civil Procedure (Rules 50(b) and 59), *federal diversity courts can no longer follow* the *Gamble* modified South Carolina punitive damages regime." *Id.* at 2 (emphasis added). This theme persisted into the court of appeals, where Northwestern noted the "Seventh Amendment deferential limitation on [federal] court review of excessive punitive verdicts." Reply Brief of Appellant, at 3 (filed Sept. 11, 1992).

Northwestern saw strategic advantages in having the application below of the punitive damages procedures prescribed in *Mattison*,[15] and it was able to persuade the district court that extensive pre-verdict procedures (such as *Mattison*'s elaborate

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[15] The district court explained that "*Northwestern* successfully argued that because the intervening *Mattison* decision had explicitly recognized that 'other penalties for the conduct,' . . . . , the issue should be fully developed on retrial." Pet. App. 27a (emphasis added). "Additionally, *Northwestern* prevailed on nearly every legal issue in dispute at the second trial. That is to say, the court required Defender to reprove much of its case, . . .; and the court charged the jury in accordance with *Mattison*." Pet. App. 32a (emphasis added).

jury instructions) were necessary because the court's post-trial review was circumscribed by the Seventh Amendment.[16] Northwestern now takes precisely the opposite tack, claiming that jury instructions, no matter how detailed, can never be adequate and that what is really needed is more vigorous post-trial review. Pet. 14. Northwestern cannot have it both ways. If Northwestern had wanted the district court to apply *Gamble*, it should have so requested. Instead, Northwestern told the court that it *could not* apply *Gamble*, including its prescribed post-trial review. *Id* at 14. Northwestern's strategy is pure gamesmanship and should be rejected outright. Holding Northwestern's petition pending the decision in *TXO* would effectively reward this chicanery.

C. THERE IS NO "CIRCUIT CONFLICT"

Another of Northwestern's distortions is its claim that there is a "circuit conflict" regarding the Seventh Amendment. This is untrue. Indeed, it is unclear that Northwestern's description of the law is accurate even in the Fourth Circuit.

In the supposedly "conflicting" case of *American Employers Ins. Co. v. Southern Seeding Servs., Inc.*, 931 F.2d 1453 (11th Cir. 1991), for example, the Eleventh Circuit applied this Court's guidance in *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989):

> In reviewing an award of punitive damages, the role of the District Court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under [Federal Rule of Civil Procedure] 59, whether a new trial or remittitur should be ordered. The Court of Appeals should then review the District Court's determination under an abuse-of-discretion standard.

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[16] Northwestern no doubt realized that it suffered no downside from its argument, since the post-trial review by the district court would be the same under the so-called "*Mattison*" and "*Gamble*" approaches.

931 F.2d at 1458. This is the *same* passage on which the court of appeals below relied, Pet. App. 4a, and on which the *Mattison* court relied. *See* 947 F.2d at 108. It is thus difficult to perceive how any conflict could arise.

In fact, no conflict exists. The Eleventh Circuit in *American Employers Ins. Co.* did not even *mention* the Seventh Amendment, let alone analyze it. The Eleventh Circuit simply indicated that, as part of the determination of whether the jury's verdict was "within the limits set by state law" — that is, whether it met the traditional common-law standard of "excessiveness" — a district court should look to Alabama state decisions. 931 F.2d at 1458. This does not conflict with *Mattison*, which expressly noted that the Seventh Amendment permits a trial court to set aside a jury verdict on state-law grounds of excessiveness. *See* 947 F.2d at 108. The second clause of the Seventh Amendment, of course, permits courts to re-examine facts tried by juries so long as the courts act "according to the rules of the common law."[17] *Id.* at 107.

Similarly, the Fifth Circuit, in *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992), never mentioned or considered the Seventh Amendment, although its decision is perfectly consistent with *Mattison*. In *Glasscock*, the Fifth Circuit noted that Texas courts had developed a multi-factored proportionality test, but simply as an elaboration of the common-law excessiveness standard: "This proportionality requirement is simply a tool to help Texas courts determine when an exemplary damage award is the product of the jury's passion rather than its reason." 946 F.2d at 1095. Accordingly, a federal court's application of the proportionality requirement implicates no Seventh Amendment concern at all.

It is also telling that Northwestern fails to give this Court a complete account of post-*Mattison* developments in the Fourth

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[17] In *Braswell v. Conagra, Inc.*, 936 F.2d 1169, 1176 (11th Cir. 1991), on which Northwestern also relies, Pet. 12, the court similarly did not mention the Seventh Amendment.

Circuit. In *Johnson v. Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991), decided after *Mattison*, a panel of the court of appeals, explained the limits of *Mattison*'s analysis:

> We find misfounded concerns about the Seventh Amendment if such [post-trial] review is conducted by the district court. . . . [T]he district judge would be conducting a narrow review based upon the evidence in the record. We are not in the case of such review asking the district judge to consider factors that were not before the jury. Rather, we are simply suggesting that the district judge review the jury's factual determination to draw a *legal* conclusion (i.e., the reasonableness of the punitive damages award). Accordingly, this narrow review does not run afoul of the Seventh Amendment.

949 F.2d at 1351 n.6 (citation omitted and emphasis in original).

The Fourth Circuit reconsidered *Hugo's Skateway en banc*. The court did not expressly adopt the panel's analysis, but it squarely rejected the argument that a State's scheme for post-trial review is irrelevant to a federal court sitting in diversity. In carefully chosen language, the Court explained:

> if state law assigns the trial or appellate court a post-verdict role in assessing the reasonableness of a punitive damages award and specifies certain factors to be considered in making that assessment, . . . this body of substantive law must also be applied in federal court, but in a manner that permits consideration by *the jury* as the sole fact finder, rather than by the judge.

Johnson v. Hugo's Skateway, 974 F.2d 1408, 1416 (4th Cir. 1992) (*en banc*).

If certiorari were granted in this case, Northwestern would no doubt contend, consistent with both the panel and the *en banc* decisions in *Hugo's Skateway*, that the jury's role as sole fact

finder is not threatened by application of state-law standards to decide the legal question of whether a particular award is excessive. The Fourth Circuit *per curiam* decision that Northwestern asks this Court to review does not mention the Seventh Amendment with respect to the district court's post-trial review, *see* Pet. App. 4a, and it is unclear what role, if any, the Seventh Amendment played in the court of appeals' decision.

There simply is no reason for this Court to review an issue that has received so little attention in the lower courts. It is evident in light of *Johnson's Skateway* that the only circuit to even mention the Seventh Amendment in this context is quite unclear about its approach. This area of punitive damages law requires further percolation in the lower courts before it can become one for serious consideration by this Court.

D. NORTHWESTERN'S SEVENTH AMENDMENT THEORY HAS NO MERIT

Even if it were properly presented, Northwestern's Seventh Amendment theory would not warrant this Court's review. Northwestern's entire argument is premised on a misinterpretation of *Tull v. United States*, 481 U.S. 412 (1987). In that case, this Court held that the Seventh Amendment did not bar Congress from authorizing judges to assess civil penalties under a cause of action created by Congress in the Clean Water Act. Crucially, *Tull* concerned the first clause of the Seventh Amendment, not the second. Even if there were no right under the first clause of the Seventh Amendment to a jury determination of the amount of punitive damages, it would hardly follow that, where a jury assessment *has in fact occurred*, the entirely separate jurisdictional constraint of the second clause — that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law" — becomes meaningless. The second clause is an independent restraint on the power of federal courts and is completely unaffected by *Tull*. Northwestern's argument is a poor cousin to the sort of "greater-power-includes-the-lesser" notions that this

Court has rejected in so many contexts.[18]

Northwestern's argument is also foreclosed by *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), which explained that, "[u]nder the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct." 111 S. Ct. at 1042. Quoting *Day vs. Woodworth*, 54 U.S. (13 How.) 363 (1852), this Court also noted that "[t]his has been always left to the discretion of the jury, as the *degree of punishment* to be thus inflicted must depend upon the particular circumstances of each case." 111 S. Ct. at 1042 (emphasis added).[19]

Northwestern's "practical" arguments (Pet. 15) in favor of its Seventh Amendment theory are also flawed. Northwestern asserts that punitive damages jury instructions, no matter how detailed, are ultimately unavailing because they inherently provide inadequate guidance. This Court has already rejected that view. *See Haslip*, 111 S. Ct. at 1044 (noting that juries are routinely afforded much greater discretion in many areas of the law). Northwestern quotes a statement by the district court discussing the "inherent tension" in assessing punitive damages, Pet. 14, but that quotation, like many aspects of the petition, is

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[18] *See, e.g., R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2543-44 (1992) (power to ban entire category of speech does not imply power to create viewpoint-based distinctions); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (unconstitutional conditions doctrine means that State's power to ban "shouting fire in a crowded theater" does not include power to "grant[] dispensations to those willing to contribute $100 to the state treasury"); *Vitek v. Jones*, 445 U.S. 480, 490-491 n.6 (1980) (procedural due process applies to state-created property that State was under no obligation to provide in the first instance).

[19] In *Browning-Ferris Indus. v. Kelco Disposal*, 109 S.Ct. 2909, 2923 n.26 (1989), the Court observed the district courts operate under the "strictures of the Seventh Amendment," stating: "As a result, we are reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury."

not what it seems. In fact, the district court's statement relates to the process of *post-trial review* and was not a criticism of the jury instructions. *See* Pet. App. 30a.[20]

II. THE SECOND QUESTION ALSO RESTS ON A DISTORTED VIEW OF THE FACTS BELOW AND HAS NO MERIT.

Northwestern claims that the punitive damages award is excessive but offers no constitutional standard by which to judge it. Evidently, Northwestern believes that this Court should simply constitutionalize the common-law "excessiveness" standard and embark on an *ad hoc*, case-by-case review of punitive damages awards. This Court, however, does not sit as the National Court of Tort Appeals, and Northwestern's "I-know-it-when-I-see-it" proposal is hardly designed to provide helpful guidance to the lower courts. The district court's thoughtful and balanced analysis fully protected Northwestern's rights; indeed, it saved the company $20 million. Northwestern neither needs nor deserves further assistance from this Court.

Northwestern's excessiveness argument is essentially an attempt to reargue the facts of the case. Northwestern contends, for example, that the award reflects the jury's decision to base the award on Northwestern's size and wealth. Pet. 19. Yet the district court's detailed jury instructions — which far exceeded the charge approved in *Haslip* — told the jury to consider wealth as only one factor, and as a factor that worked in *Northwestern*'s favor, as a limit on punitive damages: "The award of punitive damages should be sufficient to appropriately punish the defendant for its conduct but not to the extent to [e]ffect

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[20] Northwestern's dreaded spectre of forum-shopping, Pet. 15-16, is belied (a) by the fact that, even under Northwestern's view of *Mattison*, any state-law factors for post-trial review can simply be incorporated into the jury instructions issued by a federal court sitting in diversity, and (b) by Northwestern's *own behavior* in this case: Northwestern eagerly sought application of the federal rather than the state scheme.

economic bankruptcy." J.A. 708.[21]

Moreover, the district court, in reducing the jury award from $25 million to $5 million, explained that, "in this case, if one looks solely at the ability of the wrongdoer to pay, a $25 million punitive award might be justified. However, the ability of a financially sound defendant to pay a punitive award is but one of many factors which must be considered." Pet. App. 30a. Thus, if the jury award was attributable to Northwestern's wealth, Northwestern's objection was amply answered by the district court's remittitur.

Contrary to Northwestern's contention that its size and wealth was the reason for two large punitive awards, two juries, the district court and the Fourth Circuit have all found this repugnant conduct to warrant a severe punishment.[22] Although Northwestern generally objected to the introduction of evidence concerning its net worth — but not on federal constitutional grounds — Northwestern also offered, somewhat amazingly, to stipulate to the jury it had an "unlimited ability to pay any punitive award" instead of introducing evidence of its net worth. J.A. 37. This proposed stipulation, however, would have actually given the jury considerably less guidance and limitations than either *Gamble* or *Mattison*, as the jury would have had no "ceiling" or other "boundaries" for the award.[23]

Northwestern also contends that the award could not have been justified by the potential harm that Defender faced, and that

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[21] Under South Carolina law, a state court jury is simply instructed that the defendant's "ability to pay" is a relevant factor in assessing the amount of punitive damages. *Gamble*, 406 S.E.2d at 354.

[22] The district court after the second trial stated it had "sided with Northwestern on the two most difficult evidentiary issues and allowed in new testimony regarding mitigating factors." Pet. App. 28a.

[23] Northwestern also complains its wealth was "heavily emphasized in respondent's closing argument." Pet. 6-7. While respondent submits the closing argument was proper and consistent with the record, Northwestern did not object to any portion of respondent's closing argument and cannot now be heard on this issue.

$107,000 is "the most generous possible estimate" of the injury it inflicted. Pet. 2, 18-19. This is simply false. Pursuant to Northwestern's request, the district court charged the jury that it could consider such factors as "the reprehensibility of the conduct," "the defendant's awareness of the conduct's wrongfulness," and "concealment." J.A. 707. Evidence of Northwestern's overall course of conduct was necessary so that "the new jury [could] acquire an appreciation of the wrongfulness of the conduct . . . in fashioning an appropriate award." Pet. App. 8a. Accordingly, the jury was entitled to consider Northwestern's reaction when Defender confronted it with the fraudulent promise that had induced it to purchase the insurance policy: "when Defender sought to assert its rights under the promise, Northwestern threatened to cause Defender's largest customer to take its business elsewhere." Pet. App. 7a. "This one customer generated revenues for Defender of $2 million to $3 million per year." *Id.* at 25a n.6. The district court ruled — in what is a fact-intensive decision that does not warrant this Court's review — that Northwestern's "threats of reprisals" were part of "the multi-tiered wrongdoing" that "demonstrate[d] quite forcefully that punitive damages were appropriate," *id.* at 28a, and, in particular, that made a $5 million award reasonable. The district court also noted that it was law of the case that, based on the first trial, all of the wrongful "acts of Northwestern's agents are to be imputed to the company." Pet. App. 16a. Northwestern thus cannot claim that the potential harm was limited to only $107,000.

Northwestern also makes much of the fact that, after the first trial, the district judge reduced its punitive liability to $10,000. Pet. 17. Aside from the fact that the *en banc* Fourth Circuit reversed this ruling, the district judge at the second trial explained at length the reasons that a larger award was warranted. Pet. App. 32a. The court noted the evidence at the second trial was even "more damaging to Northwestern" in three specific areas. *Id.*

"First, Northwestern had not taken steps to fire or otherwise discipline its employees who were involved in the

fraudulent conduct, despite the fact that the 1985 conduct had been unanimously found to be fraudulent by a jury, a judge of this court, and an en banc panel of the United States Court of Appeals for the Fourth Circuit." Pet. App. 32a.[24] Incredibly, the evidence showed one of the agents had actually been *promoted* since the first trial. J.A. 129:7-14. Northwestern's claim that the misconduct was an isolated incident not likely to be repeated is belied by the fact that the "the evidence was susceptible to the inference that high ranking officials participated in the fraud." Pet. App. 28a.

Second, the evidence at the second trial also established that Northwestern's fraudulent promise was illegal under South Carolina law, a fact noted by the district court that was "not made known to the first jury and not argued to Judge Henderson." Pet. App. 32a. At the second trial, Northwestern — now faced with a fraud verdict and a retrial only on the amount of punitive damages — unsuccessfully attempted to inject "illegality" as the reason it had refused to refund Defender's premiums as promised. A Northwestern agent testified at the second trial "[t]he promise was made and I am terribly sorry." J.A. 277:25. The jury clearly rejected this belated excuse after this agent also admitted he had denied during his testimony at the first trial that a fraudulent promise *had even been made*. J.A. 278:12-20. Even more astonishing, the same Northwestern agent testified at the second trial that the Home Office also knew that the promise to refund premiums was illegal at the time Northwestern refused Defender's request for a refund. J.A. 279:17-25 to 280:1.

Third, evidence at the second trial revealed that Northwestern's misconduct was so serious that Northwestern risked certain disciplinary measures by the South Carolina Insurance Depart-

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[24] A Northwestern senior vice president testified at the second trial the Home Office committee which investigated agent fraud had never even discussed Defender's complaints nor had it taken any disciplinary action against any of the agents since the fraud verdict in the first trial. J.A. 455:16-25; 456:1-5.

ment, including the *revocation* of its license to sell insurance in South Carolina. Pet. App. 32a. The district court instructed the jury that under South Carolina law (S.C. Code Ann. § 38-55-50, Pet. App. 26a) it was illegal for an insurance company or agent to promise a premium refund as an inducement to purchase a life insurance policy and that "any insurance company that itself engages in any wrongful conduct as defined in state law may be subject to penalties of monetary fines and/or *revocation or suspension* of the authority to sell insurance policies in South Carolina." J.A. 709 (emphasis added). Indeed, this jury instruction was actually prepared and submitted to the district court by Northwestern. J.A. 708:16 to 709:23 (Northwestern's "Request to Charge No. 16" as read verbatim to the jury).[25] This jury instruction on the statutory penalties, together with the evidence showing Northwestern earned premium income in South Carolina alone of $20 million a year, J.A. 522:6-10, rang the death knell for Northwestern. The state-prescribed penalty, had it been enforced, would have already resulted in monetary "damages" to Northwestern many times greater than the district court's remittitur of $5 million or, for that matter, the jury verdict of $25 million.

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[25] Northwestern insisted on this jury instruction designed to indicate to the jury that it faced possible loss of its license as a result of "any wrongful conduct" — so that punitive damages would not appear to be the only means of punishing Northwestern. Once this strategy failed, Northwestern, in yet another reversal, argued precisely the opposite in the Fourth Circuit. It contended that any reference to this loss-of-license point for the purpose of establishing the seriousness of Northwestern's offense was legally barred because, in fact, under applicable South Carolina regulations "the Northwestern license *could not* have been suspended for the unauthorized tortious conduct of [its agent]." Reply Brief of Appellant, at 11 (emphasis added). Northwestern's new thinking on this subject is obviously irrelevant under the principles of estoppel, invited error, and Fed. R. Civ. P. 51. Moreover, Northwestern's reply point in the Fourth Circuit ignored that Northwestern had been found to have authorized or ratified the misconduct at issue. *See* Pet. App. 15a-16a ("The earlier trial in this action resulted in a jury determination that Northwestern was liable for the actual and constructive fraud of its agents. . . . [F]or purposes of the acts complained of in this case, the acts of Northwestern's agents are to be imputed to the company.").

Finally, Northwestern embarks on a comparative review of other punitive damages awards in the state and federal courts of South Carolina. Pet. 17-18. But Northwestern conspicuously fails to cite any case (state or federal) from South Carolina or any other jurisdiction which involved fraudulent conduct — a threat to interfere with a business relationship that would have resulted in the loss of millions of dollars and hundreds of jobs — and an attempted concealment by the highest executives in the company. Even more significantly, however, Northwestern also fails to cite any reported case in South Carolina or any other jurisdiction where the state-prescribed statutory penalties which were given to the jury in its instructions could have had a truly profound and punitive impact.

For all these reasons, the second question presented has no merit. The second question similarly provides no basis to hold the petition pending this Court's decision in *TXO Production Corp*. (It is clear that Northwestern's first question presented is not implicated by *TXO*, a case which arose in state court rather than federal court.)

This case bears no resemblance to *TXO*. In *TXO*, the trial and appellate courts upheld the jury's verdict in its entirety; here, the district court, in a searching and balanced review, reduced the award by 80%. In *TXO*, the defendant was subjected to what it described as a "really stupid/really mean" standard of review; here, Northwestern prevailed below on virtually *every* significant legal issue and received precisely the kind of review it requested, which was in fact *more rigorous* than the legal standard it now defends in this Court. In *TXO*, the defendant claimed that the award was a product solely of its wealth; here, the district court's review ensured that such was not true in this case. In *TXO*, the defendant claimed to have preserved its objections below; here, any claims that Northwestern might assert have been procedurally waived. In *TXO*, the defendant claimed that the award bore no rational relationship to the plaintiff's loss or to the legislatively prescribed penalties for the defendant's misconduct; here, the jury was able to consider Northwestern's threatened reprisal, which would have caused $2 million to $3

million in annual losses to Defender, in setting punitive damages. Moreover, imposition of the legislatively established penalty for Northwestern's misconduct would have cost it $20 million per year in lost premium income.

Accordingly, any decision in *TXO* will not affect the result below.

CONCLUSION

The Petition for Certiorari is without merit and rests on serious distortions of the record and of the decision below. It should be denied.

Respectfully submitted,

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